

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VASILE SIRCA,

Defendant-Appellant.

UNPUBLISHED

October 29, 2002

No. 234132

Wayne Circuit Court

LC No. 00-010469

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of assault with intent to commit second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a). He was sentenced to five years' probation. He appeals as of right. We affirm.

Defendant contends that his constitutional right to confrontation was violated because the trial court precluded him from cross-examining the victim about her alleged statement that she had a hard time telling the truth. Although defendant attempted to cross-examine the victim about this statement, he did not raise the "right to confrontation issue" below. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Accordingly, this issue is forfeited for appellate review. However, defendant may avoid forfeiture by showing a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, a defendant's substantial rights are not affected absent a showing of prejudice—that is, that the error "affected the outcome of the lower court proceedings." *Id.*

US Const, Am VI and Const 1963, Art 1, § 20 grant an accused the right to "be confronted with the witnesses against him." See *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). "The purpose of the Confrontation Clause is to provide for a face-to-face confrontation between a defendant and his accusers at trial," which is important because it enables the trier of fact to appraise the witnesses' credibility. *Id.* "A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998).

Thus, a defendant's constitutional right to confront witnesses may be violated where the defendant's ability to cross-examine the witnesses has been limited. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). However, although the right to confrontation “guarantees an opportunity for effective cross-examination,” it does not guarantee a defendant the right to cross-examine “in whatever way, and to whatever extent, the defense might wish.” *Id.* at 189, quoting *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993). Instead, the right merely protects a defendant's right to a “reasonable opportunity to test the truthfulness of a witness' testimony.” *Ho, supra* at 190.

Here, the trial court correctly noted that the victim testified that she was telling the truth at trial regarding the events. Moreover, the trial court invited defendant to ask the victim whether she ever told anybody that she lied about these events—a more specific inquiry than whether she had told anybody that she had a hard time telling the truth about unrelated matters. In addition, defense counsel's cross-examination had already demonstrated inconsistencies in the victim's statements and testimony. These inconsistencies supported his claim of innocence more than the victim's general propensity to tell the truth. Accordingly, we are not persuaded that the trial court unreasonably limited defendant's right to cross-examine the victim. *Ho, supra* at 190.

Further, because this was a bench trial, the trial court's ruling that it did not find the cross-examination to be relevant indicates that it was not going to find the line of cross-examination probative. In other words, the instant matter is distinct from where the trial court keeps potentially relevant information from the jury. As such, it is highly unlikely that the trial court's ruling had any impact on the outcome of the proceedings. As a result, defendant may not avoid forfeiture of this issue.¹ *Carines, supra* at 763.

Next, defendant challenges the sufficiency of the trial court's findings of fact. In *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995), we ruled that brief findings of fact are sufficient if the trial court demonstrates that it was aware of the relevant factual issues and correctly applied the law. Here, the primary, if not exclusive, factual issue was the victim's credibility. The trial court found in pertinent part: “In other words, what I'm saying is I believe her, beyond a reasonable doubt. No question about it.” In making this finding, the trial court expressly rejected defendant's arguments that the victim testified inconsistently and was motivated to lie. Accordingly, the trial court made sufficient, albeit brief, findings of fact.

Defendant also contends that the trial court's factual findings were clearly erroneous. A trial court's findings of fact are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A finding is clearly erroneous where, after reviewing the entire record, we are “left with a definite and firm conviction that a mistake has been made.” *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

Although defendant makes a compelling argument that the victim's credibility was questionable, we have noted that resolving credibility disputes is “within the exclusive province

¹ Moreover, a trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). In light of these factors, we are not persuaded that the trial court abused its discretion by precluding defendant's cross-examination of the victim on this issue.

of the trier of fact.” *People v Chavies*, 234 Mich App 274, 290; 593 NW2d 655 (1997). Here, while the victim’s testimony raises doubts about her credibility, her youth may have caused some of the inconsistency. Also, the trial court’s resolution of the credibility issues may have been based on the demeanor of either the victim or defendant while testifying at trial. A witness’s demeanor is not readily apparent from the record. Accordingly, we are not left with a definite and firm conviction that the trial court’s findings were mistaken. *Parker, supra* at 339. Consequently, we decline to reverse the trial court’s factual findings. *LeBlanc, supra* at 579.

Defendant also challenges the sufficiency of the evidence supporting his convictions. A challenge to the sufficiency of the evidence in a bench trial requires us to “view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

MCL 750.520c(1)(a) provides in pertinent part that a person is guilty of second-degree CSC “if the person engages in sexual contact with another person” and the “other person is under 13 years of age.” Thus, an assault with intent to commit second-degree CSC requires proof of an assault with an intent to engage in sexual contact with a person less than thirteen years of age. An assault may be found where there is either an attempted battery or an unlawful act placing another in reasonable apprehension of an immediate battery. *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998), quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). Here, the victim testified that she was less than thirteen years old when defendant improperly touched her genital area. The victim also testified that, on another occasion, defendant attempted to improperly touch her genital area. Thus, according to her testimony, she was—at the very least—placed in reasonable apprehension of a battery (second-degree CSC) on two occasions. Accordingly, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to support defendants’ convictions.

Finally, defendant challenges his jury trial waiver. A defendant charged with a felony has a constitutional right to a jury trial. See *People v Bearss*, 463 Mich 623, 629-630; 625 NW2d 10 (2001). However, a defendant may waive his or her right to a jury trial. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). MCR 6.402(B) states:

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Ordinarily, we review a trial court’s determination that a defendant validly waived his or her right to a jury trial for clear error. *Leonard, supra* at 595. However, defendant did not raise this issue below; therefore, it is forfeited for appellate review. *Carines, supra* at 763. Defendant may avoid forfeiture by showing a plain error that affected his substantial rights. *Id.*

Defendant contends that his jury waiver was involuntary. However, when specifically asked by the trial court, defendant denied that he had been promised anything or threatened in exchange for his waiver. Accordingly, defendant’s contention that his waiver was involuntary is without merit.

Defendant also contends that his jury waiver was not knowingly made. However, defendant does not assert that he did not understand that he was waiving his right to a jury trial or that he somehow misunderstood the importance of his waiver. Instead, he merely contends that the *record* failed to establish that he understandingly waived his right to a jury trial. Regardless, the trial court elicited from defendant that he knew that he had a right to a jury trial. Defendant indicated that he had discussed his rights with defense counsel. The trial court also accepted defendant's signed waiver, which stated that he understood he had a constitutional right to a jury trial. Under these circumstances, the trial court did not clearly err in finding that defendant understandingly waived his right to a jury trial. As such, we conclude that plain error did not occur; as a result, defendant may not avoid forfeiture of this issue. *Carines, supra* at 763.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens